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GOH MARY

v.

PUNITHAVATHI PONNIAH & ORS

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HIGH COURT MALAYA, KUALA LUMPUR

SM KOMATHY SUPPIAH JC

[CIVIL SUIT NO: S2-22-565-2000]

15 AUGUST 2013

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CIVIL PROCEDURE: *Costs - Getting up fee - Application to review amount allowed by Registrar - Getting up fee awarded in respect of interlocutory application made to set aside consent judgment - Whether award of RM40,000 manifestly excessive - Whether getting up fees should not be exorbitant where application involved settled principles - Hong Leong Bank Bhd v. Lee Khai Sin - Rules of the High Court 1980, O. 59 r. 36(1)*

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This was an application by the first defendant pursuant to O. 59 r. 36(1) of the Rules of the High Court 1980, for an order to review the amount of RM40,000 allowed by the learned Registrar in favour of the third to seventh defendants as getting up fees. The getting up fees was awarded in respect of an interlocutory application made by the first defendant to set aside a consent judgment. The first defendant submitted that the award of RM40,000, in favour of the third to seventh defendants, was manifestly excessive as the primary litigant resisting the application was the plaintiff and the other defendants herein had merely adopted those submissions. He further submitted that the said application did not involve novel or difficult points of law as principles governing an application to set aside a consent order are well settled and suggested a sum of RM5,000. In response, the third to seventh defendants submitted that the sum awarded by the Registrar was fair and reasonable, in view of the importance of the case to the defendants as they had an interest in preserving the consent order to ensure the speedy administration of the estate of the deceased.

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Held (reducing award to RM8,000):

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(1) A judge sitting in appeal in a taxation matter has no power to disturb the discretion of the Registrar on a mere question of quantum unless such discretion has been exercised on a wrong principle or the quantum allowed is obviously wrong. The

review by the judge does not operate as a rehearing and the judge is not entitled to substitute his discretion for that of the Registrar in respect of the amounts awarded. (para 10)

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(2) In interlocutory proceedings, getting up fees should not be exorbitant especially where the application involved settled principles. As the application filed by the first defendant did not involve any novel issues, there was no justification for the award of RM40,000. Applying the yardstick formulated in the case of *Hong Leong Bank Bhd v. Lee Khai Sin*, the figure should not exceed RM5,000. However, since copious authorities had been cited by counsel for the third to seventh defendants to support these well settled principles, a figure of RM8,000 would be reasonable and appropriate. (para 14)

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Case(s) referred to:

Hong Leong Bank Bhd v. Lee Khai Sin [2008] 7 CLJ 129 HC (*fol*)

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Siti Juliana Suen Abdullah & Ors v. Sungai Wang Properties Sdn Bhd [2009] 3 CLJ 592 HC (*refd*)

Yong Teck Lee v. Harris Mohd Salleh & Anor [2010] 1 CLJ 156 FC (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 59 r. 36(1)

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For the 1st defendant - CP Mahendran; M/s RR Chelliah Brothers

For the 3rd to 7th defendants - S Kanaga; M/s Raja Seelan & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT

SM Komathy Suppiah JC:

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[1] This was an application by the first defendant pursuant to O. 59 r. 36(1) of the Rules of the High Court 1980, for an order to review the amount of RM40,000 allowed by the learned Registrar in favour of the third to seventh defendants as getting up fees. The getting up fees was awarded in respect of an interlocutory application made by the first defendant to set aside a consent judgment.

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Background Facts

[2] In the year 2000, the plaintiff filed an action against the first and second defendants and six others for an order, *inter alia*, to discharge the first and second defendant as executors and trustees

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A of her late husband's estate. Her husband had passed away on
21 February 1994. The remaining six defendants, namely the third
to eighth defendants, were the children of the plaintiff. The
children were cited as defendants as they were beneficiaries under
the will of her late husband and interested in the early distribution
B of the estate.

[3] On 25 August 2004, the action was settled and a consent
judgment was recorded in open court in the presence of all parties
including counsel for the first defendant. By the terms of the
C consent judgment the first and second defendants agreed, *inter*
alia, to discharge themselves as the executors and trustees of the
estate and it was further agreed that their remuneration would be
paid by the estate.

D [4] Some months later, the first defendant made an application
to set aside the consent judgment of 25 August 2004. The
application was allowed by the court on 3 May 2005, but on
appeal, the Court of Appeal reinstated the consent judgment with
liberty to the first defendant make a fresh application before a
different judge.
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[5] On 6 October 2005, the first defendant made a fresh
application by way of summons in chambers to set aside the
consent judgment. This application was dismissed with costs in
favour of the third to the seventh defendants on 13 November
F 2006 by YA Dato' Wan Adnan Bin Muhammad.

[6] The third to the seventh defendants then filed this bill of
costs, and it came up for taxation before the Registrar on 1 June
2009, and were awarded RM40,000 as getting up fees. Upon
G reviewing the award on 29 October 2010, the Registrar confirmed
it.

[7] In her grounds of decision, the Registrar said that she
confirmed the award that she had made, stating that:

- H (i) the facts and issues in this application were far more
complicated than a simple foreclosure matter and O. 14
application;
(ii) a certain amount of skill and knowledge was required from an
I advocate and solicitor to oppose the application;

(iii) the value of the subject matter was substantial and the disposal of the application was important to the third to seventh defendants to ensure that administration of the estate could be proceeded with promptly.

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Parties, Submissions

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[8] Counsel for the first defendant submitted vigorously that the award of RM40,000 in favour of the third to seventh defendants was manifestly excessive as the primary litigant resisting the application was the plaintiff and the other defendants herein had merely adopted those submissions. He further submitted that the said application did not involve novel or difficult points of law as principles governing an application to set aside a consent order are well settled and suggested a sum of RM5,000. He contended that the current trend was to award not more than RM5,000 in interlocutory applications and even less where the principles applicable to the application were well settled. He cited two decisions of Hamid Sultan J (as he then was) in *Hong Leong Bank Bhd v. Lee Khai Sin* [2008] 7 CLJ 129 and *Siti Juliana Suen Abdullah & Ors v. Sungai Wang Properties Sdn Bhd* [2009] 3 CLJ 592 in support of his submission.

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[9] In response, counsel for the third to seventh defendants submitted that the sum awarded by the Registrar was fair and reasonable in view of the importance of the case to the defendants as they had an interest in preserving the consent order to ensure the speedy administration of the estate of the deceased.

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The Law

[10] It is well settled law and has been for decades that a judge sitting in appeal in a taxation matter has no power to disturb the discretion of the Registrar on a mere question of quantum unless such discretion has been exercised on a wrong principle or the quantum allowed is obviously wrong. The review by the judge does not operate as a rehearing and the judge is not entitled to substitute his discretion for that of the Registrar in respect of the amounts awarded.

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[11] It will suffice to refer to the case of *Yong Teck Lee v. Harris Mohd Salleh & Anor* [2010] 1 CLJ 156; [2009] 6 MLJ 437, which restates these principles. His Lordship James Foong FCJ at p. 162 (CLJ); p. 443 (MLJ), held:

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- A First, it is well established that the court will not interfere with the decision of a taxing officer upon a mere question of quantum if the taxing officer has exercised her discretion after due consideration of all circumstances and if no question of principle arises. It is only when such discretion has been exercised based on some wrong principle or the quantum allowed is obviously wrong that a judge will interfere - see *Pang Kok v. Leong Fock Hap & Anor* [1996] 4 MLJ 97.

An elaboration of this proposition is found in *White v. Altrincham Urban District Council* [1936] 1 All ER 923 where Slesser LJ said:

- C In my opinion, the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of quantum unless the registrar has purported to exercise that discretion in a way not warranted by law. That such a view had long been held in proceedings in the High Court cannot be disputed. In *Alsop v. Lord Oxford* (1833) 1 My & K 564 at p. 566, Sir John Leech MR said:

- E Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact whether the business had been done, and of the proper charge to be made for it; the court will only interfere where the master acts upon some mistaken principle.

- F And for the latest, Justice Chong Siew Fai CJ (Sabah and Sarawak) in the Federal Court case of *Bar Council v. Datuk V Kanagalingam* [2000] 3 AMR 3383 concluded:

- G On the authorities, it is clear that in exceptional cases where it can be shown that wrong principle was applied, or there is some other material error, the judge upon review can set aside or amend the award on quantum.

My Decision

- H [12] Turning to the present case, in view of the rule laid down in *Yong Teck Lee's* case, the question I need to consider is whether the quantum awarded by the Registrar was obviously or manifestly wrong as suggested by counsel for the first defendant. I accept the submission advanced by counsel for the first defendant that the law governing the setting aside of consent judgments is trite and the Registrar erred in concluding that the application involved complicated facts and issues.

[13] It is convenient at this point to examine the decision of Hamid Sultan J in *Hong Leong Bank Bhd v. Lee Khai Sin* [2008] 7 CLJ 129. In that case His Lordship provided some useful guidelines for assessing getting up fees in taxation proceedings. This is what he said:

The plaintiff's seeking a getting up fee RM20,000 for an interlocutory which was consented to, surely is not only excessive but ought not be entertained. I would have thought that all things being equal and as a general rule a contested application in respect of procedural points or directions from the court, the getting up fees should not exceed RM2,000. Often applications which involve issues on law and fact but relating only to mundane matters should not exceed RM5,000. If there is some level of complexity, then it should not exceed RM10,000, unless the subject matter involved in respect of the application not the suit proper is one which is extremely crucial taking into consideration the quantum of the claim as the case may be. Such application in my view must be very rare.

Registrars must take note that it is not desirable to grant excessive getting up fees for interlocutory application. This jurisprudence must not be forgotten. Support for the proposition is found in the Subordinate Court Rules 1980, O. 48 r. 21.

[14] I would adopt the same position taken by Hamid J in *Hong Leong Bank* that in interlocutory proceedings, getting up fees not be exorbitant especially where the application involves settled principles. As the application filed by the first defendant did not involve any novel issues, there was no justification for the award of RM40,000. Applying the yardstick formulated in *Hong Leong's* case, the figure should not exceed RM5,000. However, since copious authorities had been cited by counsel for the third to seventh defendants to support these well settled principles, a figure of RM8,000 would be reasonable and appropriate.

Conclusion

[15] For the reasons stated, I reduced the award to RM8,000 and made no order as to costs. By consent, the first defendant agreed to pay the third to seventh defendants the costs within two weeks from the date of this order.

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